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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 REBECCA GARTENBERG, et al.,

4 Plaintiffs,

5 v.

24 Civ. 2669 (JPC)

6 THE COOPER UNION FOR THE ADVANCEMENT
7 OF SCIENCE AND ART,

8 Defendant.
-----x

9 New York, N.Y.
10 January 28, 2025
10:00 a.m.

11 Before:

12 HON. JOHN P. CRONAN,

13 District Judge

14 APPEARANCES

15 ARNOLD & PORTER LLP
Attorneys for Plaintiffs
16 BY: AARON STIEFEL
DEBRA E. SCHRECK
17 MICHAEL J. GERSHONI
BRIDGETTE GERSHONI
18 MELISSA ROMANOVICH

19 -and-

20 THE LAWFARE PROJECT
Attorneys for Plaintiffs
21 BY: ZIPORAH REICH

22 PATTERSON, BELKNAP, WEBB & TYLER LLP
Attorneys for Defendant
23 BY: LISA E. CLEARY
JACQUELINE LEE BONNEAU
24 BHARATH PALLE
25

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1 (Case called)

2 THE DEPUTY CLERK: Can counsel, starting with the
3 plaintiff, please state your name for the record.

4 MS. CLEARY: Lisa Cleary, Patterson, Belknap, Webb &
5 Tyler.

6 THE COURT: Good morning, Ms. Cleary.

7 MS. CLEARY: For Cooper Union.

8 THE COURT: I should have asked you as well.

9 MS. BONNEAU: Jacqueline Bonneau, also Patterson
10 Belknap, for Cooper Union.

11 THE COURT: Good morning, Ms. Bonneau.

12 MR. PALLE: Bharath Palle.

13 THE COURT: Good morning, Mr. Palle.

14 And for plaintiff then?

15 MS. SCHRECK: Good morning, your Honor. Debra
16 Schreck.

17 THE COURT: Turn on your microphone there.

18 MS. REICH: Good morning, your Honor. Ziporah Reich
19 from the Lawfare Project for plaintiffs.

20 THE COURT: Good morning, Ms. Reich.

21 MS. ROMANOVICH: Good morning, your Honor. Melissa
22 Romanovich, Arnold & Porter for the plaintiffs.

23 THE COURT: Good morning, Ms. Romanovich.

24 MR. STIEFEL: Good morning, your Honor. Aaron Stiefel
25 from Arnold & Porter.

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1 THE COURT: Good morning.

2 MR. STIEFEL: Good morning, your Honor. Michael
3 Gershoni from Arnold & Porter on behalf of the plaintiffs.

4 THE COURT: Good morning, Mr. Gershoni.

5 MS. GERSHONI: Good morning. Bridgette Gershoni from
6 Arnold & Porter on behalf of the plaintiffs.

7 THE COURT: Good morning, Ms. Gershoni.

8 So we're here for oral argument on the defendants'
9 motion to dismiss the complaint in this matter. I expect to
10 have roughly 30 minutes per side. I am not having a timer up
11 here. There is a lot of topics to cover, and I certainly want
12 to make sure that we have the chance to discuss them.

13 For the plaintiffs, I understand Ms. Romanovich will
14 be handling the Title VI and related state and city law claims,
15 Mr. Gershoni will handle the breach of contract, and
16 Ms. Gershoni will handle the other common law claims and
17 remedies.

18 Is that correct?

19 MS. SCHRECK: Correct, your Honor.

20 THE COURT: OK. And, Ms. Cleary, for the defendants,
21 will you be arguing then?

22 MS. CLEARY: Yes, I will, your Honor.

23 THE COURT: OK. Just generally speaking, when
24 discussing the hostile environment claims, I expect, probably
25 for ease, I likely will be largely referring to Title VI, but

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1 many of those arguments, of course, would apply to the
2 counterpart city and state causes of action.

3 OK. Ms. Cleary then, since it's your motion, we'll
4 start with you, and feel free to use the podium. Wherever you
5 are, just make sure you're close to the mic so we can all hear.

6 MS. CLEARY: Thank you, your Honor.

7 There are two motions before the court, a motion to
8 dismiss all eight counts in the complaint for failure to state
9 a claim and a motion to strike the request for punitive damages
10 and injunctive reliefs. For all of the reasons stated in
11 Cooper Union's motion to dismiss, there is no basis for this
12 litigation to proceed and all claims should be dismissed.

13 Let me begin by framing the facts as alleged by
14 plaintiffs in their complaint. The gravamen of plaintiffs'
15 complaint concerns Cooper Union's handling of an October 25 of
16 2023 protest described as a walkout by the organizers with
17 plaintiffs participating in a counter-protest in support of
18 Israel in close proximity to the walkout protesters in the
19 public square.

20 The events at issue commenced at one o'clock p.m. on
21 the 25th and moved forward on a public sidewalk outside Cooper
22 Union's Foundation Building for approximately three hours
23 without injury to any person or any property damage.
24 Plaintiffs admit that they were fully visible and near the
25 demonstrators during this period. There was no interaction,

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1 physical or verbal, between these two groups of protestors for
2 these three hours.

3 Further, based on plaintiffs' pleadings, Cooper Union
4 had no reason to believe that the pro-Palestinian protesters
5 would decide to leave the public sidewalk and enter the
6 Foundation Building. Throughout the afternoon, as plaintiffs
7 also admit, Cooper Union's leadership remained in close contact
8 with its security team and the NYPD, who were both on the scene
9 that afternoon.

10 THE COURT: But does that fact really help you?

11 I mean, being in contact with the NYPD is pretty much
12 meaningless if you're not taking them up on their assistance,
13 their offer for assistance.

14 MS. CLEARY: Your Honor, that goes to the standard
15 here for the court's consideration, which is whether Cooper
16 Union's actions and response to protest rised to the level of
17 deliberate indifference under the law. And we submit, as Judge
18 Stearns in the case *StandWithUs v. MIT* cautioned that Cooper
19 Union's measured response to the events of the day is entirely
20 appropriate given the facts that plaintiffs pled.

21 And under these circumstances, it was not deliberately
22 indifferent. Plaintiffs, we understand, vehemently disagree,
23 taking issue with how Cooper Union responded. No decisional
24 law however, your Honor, cited by plaintiff supports the right
25 of plaintiffs to determine how Cooper Union should have

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1 responded to these events.

2 Cooper Union's responses were reasonable and
3 appropriate under the circumstances. A group of plaintiffs who
4 were outside on the public square during the external protest
5 chose to move into the Foundation Building. A group of the
6 plaintiffs who were also outside in a public square during the
7 external protest chose to follow the demonstrators into the
8 Foundation Building and gather by the floor-to-ceiling windows
9 at the library. The pro-Palestinian demonstrators returned to
10 the first floor after protesting in front of the president's
11 office on the seventh floor and attempted to enter the library.

12 Plaintiffs allege that Cooper Union's administrators
13 locked the library doors at some point after plaintiffs entered
14 the library. There is no allegation that the pro-Palestinian
15 protesters entered the library and, indeed, plaintiffs admit in
16 paragraph 87 of their complaint that the protesters were unable
17 to gain entry to the library.

18 The pro-Palestinian demonstrators then gathered
19 outside the library's windows raising slogans and pounding on
20 the glass. The plaintiffs who were visible to the
21 demonstrators alleged that they feared for their safety and
22 that that harassment and intimidation lasted for approximately
23 a 20-minute period. Plaintiffs, however, also admit that they
24 refused a Cooper Union employee's suggestion that they move
25 away from the windows to avoid having to see the protesters or

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1 leave the library through a back exit to avoid the protesters.
2 After 20 minutes, plaintiffs also plead that the pro-
3 Palestinian protesters left the building of their own accord.

4 Plaintiffs exited the building as a group with some,
5 in fact, accepting brief escorts by campus security guards. No
6 one was injured during the protest inside the Foundation
7 Building and no one's property was damaged.

8 The allegations the plaintiffs plead of harassment and
9 discrimination are conclusory, your Honor. Plaintiffs don't
10 plead that the demonstrators used any slurs or hurled any
11 invectives at plaintiffs. On the contrary, plaintiffs only
12 allege that the demonstrators were raising broad political
13 slogans which were not directed at anyone specifically. Even
14 though plaintiffs allege that they were visible to the
15 protesters outside the library, there is no allegation that the
16 protesters wanted to enter the library because plaintiffs were
17 there.

18 As Judge Stearns noted in the *StandWithUs* decision,
19 Title VI does not require a faultless response by college admin
20 administrators faced with claims of discrimination accompanied
21 by campus unrest, and there are no facts pled by plaintiffs
22 that meet the stringent standard of fault for deliberate
23 indifference here.

24 Plaintiffs have made no showing that Cooper Union's
25 response was so lax, misdirected, or so poorly executed as to

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1 be clearly unreasonable under the known circumstances.

2 THE COURT: Well, just talking about the October 25
3 incident, and there are more allegations than just what
4 happened in the Foundation Building that day, just talking
5 about after the demonstrators came into the building, security
6 did not check the IDs of any of them. They pushed past
7 security. No action was taken to disperse the demonstrators.

8 As I mentioned before, NYPD offered to enter the
9 building to intervene, but President Sparks told them to stand
10 down. Even she herself locked herself in the office because
11 presumably she was scared as to what was occurring, and she was
12 able to escape through a back exit while these students were
13 locked in a library with demonstrators banging on the glass for
14 20 minutes.

15 How is that an adequate response?

16 MS. CLEARY: Your Honor, the response is adequate
17 because it was a measured response, not to initiate or escalate
18 a situation.

19 THE COURT: So no response is a measured response?

20 MS. CLEARY: The response was to ensure that, with
21 respect to what was going on inside the library, that the doors
22 were closed so that the protesters could not enter and that
23 there be a measured response that did not escalate the
24 situation vis-a-vis police intervention.

25 THE COURT: So let's assume that argument for now.

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1 Part of that would be that I would imagine appropriate action
2 would be taken after the incident for these individuals who
3 clearly were in violation of the school policy and/or make the
4 press and number of students very scared for their safety.
5 President Sparks promised to review footage and take action and
6 assured that the school takes its code of conduct policy very
7 seriously. But at the end of the day, it seemed like the
8 school did nothing.

9 Did a single student who engaged in that conduct on
10 October 25 face any discipline?

11 MS. CLEARY: Your Honor, Cooper Union is also invested
12 with broad discretion with respect to how to handle misconduct
13 on the campus. Plaintiffs pled in their complaint that
14 President Sparks initiated an investigation into the
15 circumstances of the October 25 protest. It would be
16 inappropriate for Cooper Union to share details with the
17 community at large of what disciplinary measures were entered
18 against students, given the protections that students enjoy
19 under the law.

20 THE COURT: But at this stage, though, I have to
21 assume the allegations in the complaint and the complaint I
22 believe alleges that no actions were taken.

23 Is that right?

24 MS. CLEARY: Plaintiffs would have no reason to know
25 whether actions were taken or not, your Honor, given the

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1 privacy considerations at issue here.

2 THE COURT: Well, don't we need discovery on that
3 issue then?

4 MS. CLEARY: I don't think it's relevant, your Honor,
5 to the claims at issue here. The issue is, was Cooper Union
6 deliberately indifferent in doing nothing in response to the
7 events of the day. And Cooper Union, in fact, did many things
8 in response to the day including, your Honor, many of the
9 things that the DEA in its guidance have said are appropriate
10 responses on the part of college administrators, including
11 condemning antisemitism on multiple occasions.

12 Publicly stating that it was coordinating with the
13 NYPD for ensuring campus safety, as I said, initiating an
14 investigation into the events of the day, expanding its slate
15 of counseling resources provided to the student community,
16 removing all unauthorized posters, banners, graffiti within a
17 few hours or a few days of when they were put up, and
18 commencing special programming and educational sessions to
19 educate the community on the history of the Middle East
20 conflict.

21 THE COURT: Didn't some of the graffiti remain up over
22 a week just by complaints of students?

23 MS. CLEARY: Your Honor, graffiti removal within a
24 reasonable period of time would not be shown to be deliberate
25 indifference. It's a small college and a lot of territory to

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1 cover. And as plaintiffs pled, they did remove the graffiti,
2 they did remove the posters. Some many within hours and some
3 within -- and the graffiti within days, so ...

4 THE COURT: Now, Ms. Cleary, you rely a lot on the
5 First Amendment here.

6 What is the nature of the First Amendment interest
7 that you're seeking to invoke?

8 Is it Cooper Union's First Amendment right to control
9 its educational environment? Is it the right of the students
10 to express themselves on campus? How is the First Amendment
11 implicated here?

12 MS. CLEARY: It would be the right of students and
13 faculty to express themselves on the Cooper Union campus, your
14 Honor.

15 THE COURT: Does Cooper Union have standing to assert
16 First Amendment claims of its students?

17 MS. CLEARY: What Cooper Union has stated in its
18 motion to dismiss, your Honor, is that the argument is that
19 there is nothing in Title VI or the regulations implementing it
20 that require or authorize a school to restrict any rights
21 otherwise protected by the First Amendment to the Constitution.

22 THE COURT: Now, your moving brief has a line that
23 says, Every instance of challenged conduct in the complaint is
24 speech or expression about controversial geopolitical issues.

25 Is it your position that every allegation of potential

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1 harassment in the complaint must be disregarded under the First
2 Amendment?

3 MS. CLEARY: I don't think that that is what we are
4 saying, your Honor.

5 THE COURT: OK. Let me ask you this scenario.

6 If the incident here was more overt antisemitic
7 speech, say the protesters were flying flags with swastikas on
8 them or expressly calling for the killing of Jews, would that
9 change the First Amendment calculus here?

10 MS. CLEARY: It might, your Honor.

11 THE COURT: So, if that's the case, what is the First
12 Amendment principle here that speech becomes actionable under
13 Title VI once it reaches some heightened threshold of
14 offensiveness or overtness?

15 MS. CLEARY: Our legal position, your Honor, is that
16 the conduct alleged in the complaint, posters and banners
17 expressing a perspective on the Middle East conflict, is speech
18 protected and it does not compel Cooper Union to silence that
19 speech because plaintiffs in this case wish for Cooper Union to
20 do so. It is not plaintiffs' right to advise and compel Cooper
21 Union to take specific action with respect to political views
22 on campus, your Honor.

23 THE COURT: I believe you suggested, but just to
24 confirm, I assume you don't dispute that Title VI would reach
25 antisemitic harassment or other antisemitic discrimination

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1 against Jews, is that right?

2 MS. CLEARY: It would, your Honor. We submit that
3 those facts are not present here.

4 THE COURT: Understood.

5 In terms of the university's response to some of the
6 illegal or the unauthorized postings or postings in violation
7 of university policy, didn't some of that occur right in front
8 of security?

9 MS. CLEARY: Security is guided by the administration
10 with respect to appropriate action to be taken, and for that
11 reason, for example, your Honor, that it took several hours to
12 remove posters is entirely reasonable under the circumstances.
13 And pragmatic, too, your Honor.

14 THE COURT: Why was it then reasonable and pragmatic
15 to hand the posters back to the protesters that were improperly
16 and unlawfully put up?

17 MS. CLEARY: It's their property, your Honor.

18 THE COURT: They don't forfeit their interest in their
19 property when they put it up in violation of a private
20 institution's policy on that private institution's walls?

21 MS. CLEARY: The posting policy does not state, your
22 Honor, that Cooper Union will confiscate property posters
23 improperly posted on Cooper Union's property.

24 THE COURT: Were the students at least told don't put
25 it up again?

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1 MS. CLEARY: Your Honor, there is not a pleading by
2 the plaintiffs that the posters that went up throughout the
3 campus were identified to be posted by particular students, so
4 Cooper Union did not know who posted the posters. It would not
5 be possible for them to discipline those students.

6 THE COURT: I believe there is a pleading that there
7 was not a warning about future violations, though.

8 MS. CLEARY: Could you repeat that, your Honor?

9 THE COURT: Sure.

10 I believe there was a pleading -- I don't have the
11 paragraph at my hand right now -- that the protesters were not
12 warned about future violations and not committing future
13 violations.

14 MS. CLEARY: Again, your Honor, I do not believe the
15 posting policy at issue requires Cooper Union to notify
16 individuals. And, again, they didn't know who was posting
17 those posters. There is information in the complaint about
18 President Sparks, for example, encouraging anyone who felt that
19 they were being discriminated on the basis of their religion or
20 national origin to follow the procedures that govern that
21 nondiscrimination policy under Cooper Union's policies, and
22 that was what plaintiffs pled in the complaint as well.

23 So there were avenues for people to lodge complaints
24 if they felt they were discriminated against in this matter.
25 The complaint does not allege that any of the named plaintiffs

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1 ever invoked Cooper Union's nondiscrimination policies to lodge
2 complaints for what they were allegedly experiencing on the
3 campus. The recent decision in the Eastern District of
4 Pennsylvania written by Judge McHugh suggested that a failure
5 to lodge complaints deprives a plaintiff in circumstances such
6 as this of being able to claim deliberate indifference because
7 the college would not have been put on notice of their
8 concerns.

9 THE COURT: You don't think Cooper Union was on notice
10 of the concerns of Jewish students at this point?

11 MS. CLEARY: And, your Honor, Cooper Union was on
12 notice and took the steps, as I outlined earlier, to ensure
13 that the campus was a safe campus for all students.

14 THE COURT: Is it your position that simply locking
15 the doors of the library with the students in there is enough
16 for the school to discharge its obligations under Title VI?

17 MS. CLEARY: As plaintiffs pled, your Honor, in
18 addition, I will just say the public record suggests that the
19 doors were not locked, but we'll accept that allegation as
20 true. The plaintiffs also pled in their complaint that Cooper
21 Union's administrators offered them to move away from the
22 windows so as to avoid the protesters through the glass, and
23 that Cooper Union also offered an exit both of which the
24 plaintiffs denied those requests for assistance. So it was
25 three steps, your Honor, that Cooper Union took to try to quell

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1 the concerns of plaintiffs.

2 THE COURT: Would there have been any belief of the
3 police or security escorting them through that back exit?

4 MS. CLEARY: Plaintiffs do not plead that that is what
5 they requested, but Cooper Union did offer a back exit. And if
6 the protesters were near the windows, it would seem unlikely
7 that there could be a real safety concern there.

8 THE COURT: I mean, there were students crying, there
9 were students calling their loved ones. After the safety
10 issue, President Sparks was concerned enough about her safety
11 that she locked herself in her office and she was able to. And
12 all they were told was that they should just go hide upstairs
13 in the windowless portion of the library or do their best to
14 try to escape a back exit, and this is all while they are
15 trying to have the police called, while the school is refusing
16 offers from the police to intervene.

17 I'm just having trouble understanding how this is a
18 reasonable response.

19 MS. CLEARY: So, your Honor, several things.

20 First, the allegations confirm that there were a high
21 level of administrators in the library with the students at the
22 time offering aid and protection. Also, the pleadings confirm
23 that security and NYPD were on standby. And I would also note,
24 your Honor, that in the case involving Columbia and the protest
25 on the Columbia campus, forceful intervention could have led to

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1 far more severe consequences. And I will reaffirm, again, that
2 Title VI, as Judge Stearns noted, does not require clairvoyance
3 and it is appropriate for colleges and universities to take
4 measured approaches, given all the facts and circumstances that
5 are present at the time.

6 And as your Honor is also aware from their pleadings,
7 after 20 minutes in front of the library, the protesters left
8 of their own accord. There was no physical injury. There was
9 no property damage. And Cooper Union, once again, offered the
10 plaintiffs in this case a safe exit, some of them taking
11 advantage of it by having security take them home.

12 In all of these circumstances, this set of facts that
13 played out with Cooper Union's administrators is very much in
14 line with the reasoning of Judge Stearns in the *StandWithUs* v.
15 *MIT* case and you have to look at all of the circumstances of
16 the day, not just the 20 minutes in the library, and understand
17 that Cooper Union's response was entirely reasonable under
18 those circumstances.

19 THE COURT: And you may, at the end of the day, be
20 right about that. But doesn't that just beg the need for
21 discovery to figure out if you are?

22 MS. CLEARY: Based on the pleadings that plaintiffs
23 submitted, your Honor, the facts are there for this court to
24 dismiss the complaint on a finding that there can be no
25 stanchion of deliberate indifference based on the pleading, the

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231-paragraph complaint that was filed, your Honor.

THE COURT: You touched on it a bit.

MS. CLEARY: Your Honor, I would also say --

THE COURT: Go ahead.

MS. CLEARY: -- that one of the other environment requirements of Title VI is that there will be a loss of an educational opportunity or benefit, and Cooper Union maintains that they cannot substantiate that point here.

THE COURT: Well, didn't the Second Circuit say in *Zeno*, Z-e-n-o, that educational benefits can include an academic environment free from discriminatory hostility. So, if they prevail up to that point, aren't they pretty close to meeting that prong?

MS. CLEARY: There was a single incident, your Honor, of the protest in the 20 minutes in the library. The *Davis* case from the Supreme Court of the United States makes clear that, while theoretically possible, it is highly doubtful that a single incident of a peer-to-peer harassment could make a Title VI claim, your Honor.

This case is very unlike *Zeno*. In *Zeno*, it involved a multi-year harassment of the plaintiff who was a biracial child attending a rationally homogenous school with less than five percent of the students being of a minority background. *Zeno* was repeatedly assaulted and abused with racial epithets over a three-year period in high school. Other students

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1 repeatedly threatened to rape his younger sister and even
2 displayed a noose on a tree.

3 Those are not the facts here, your Honor. And I would
4 also say, in the *Zeno* case, the court suggested that, in fact,
5 under the facts of *Zeno*, the school would have been much better
6 off focusing on education and learning for the population of
7 students in the school rather than simply focusing on
8 discipline for the students who were inappropriate to Anthony,
9 the child in that matter.

10 THE COURT: Well, the facts in *Zeno* certainly were bad
11 ones, but in terms of what's alleged here and the loss of
12 educational benefits or opportunities, why aren't the
13 allegations in paragraph 142 of the complaint enough?

14 The plaintiff alleged that Jewish students suffered
15 emotional distress, including intense anxiety and panic
16 attacks, having engaged therapists, missed and/or dropped
17 classes, failed to complete and perform on assignments, have
18 avoided campus buildings like the Foundation Building library,
19 and even that one student delayed completing their degree,
20 causing significant financial and temporal loss.

21 Doesn't that reflect at least an allegation that there
22 was a loss of educational benefits or opportunities?

23 MS. CLEARY: The loss of educational benefits or
24 opportunities has to be related to conduct that Cooper Union
25 did or didn't take. I don't dispute that plaintiffs may have

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1 found it difficult to be on a college campus after the
2 October 7 attacks.

3 But the question is, did Cooper Union do anything with
4 respect to depriving students of educational benefits or
5 opportunities, and plaintiffs have not pled any allegation that
6 Cooper Union was a part or privy to the loss of educational
7 benefits or opportunities, your Honor.

8 THE COURT: I do want to just briefly go back to one
9 allegation we have not touched upon that I want to give you the
10 opportunity to address.

11 I believe paragraph 104 of the complaint alleges a
12 number of things, but one of them is that a bathroom stall was
13 vandalized with the phrase *From the River to the Sea* written in
14 a font that is commonly associated with.

15 What should I take of that allegation?

16 MS. CLEARY: It's a very serious allegation, your
17 Honor. They did not plead that a Cooper Union administrator
18 put that on the bathroom stall. Cooper Union, as they also
19 pled, however, removed posters and signs that were
20 inappropriate. That is Cooper Union's obligation. And there
21 is no pleading that Cooper Union was aware of whoever it was
22 that placed that on the bathroom stall.

23 Cooper Union cannot be in all places on the Cooper
24 Union campus. It's a small college with a relatively small
25 group of college administrators, your Honor. Cooper Union

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1 responded reasonably under the circumstances and in a timely
2 manner under the circumstances. That is its legal obligation
3 under Title VI.

4 THE COURT: In terms of the breach of contract claims,
5 what is your view on whether students can sue a school for
6 breach of contract if the school's materials, that is,
7 handbooks, catalog, bulletins, establish certain particular
8 rights and obligations?

9 Can a student sue under those circumstances?

10 MS. CLEARY: So, we submit that they cannot, your
11 Honor. That generalized allegations to provide plaintiffs a
12 campus free of unlawful discrimination and harassment
13 allegation is not sufficient to support a breach of contract
14 claim. And the Sarah Lawrence College case, that case, unlike
15 here, failed to follow its own Title IX procedures and refused
16 to offer the plaintiff accommodations available to a victim of
17 sexual assault under campus policies. By contrast here,
18 plaintiffs failed to plead a breach of contract claim when they
19 make bald assertions and conclusory allegations claiming the
20 university's rules or procedures were not followed.

21 And on the building access policy, your Honor, Cooper
22 Union didn't owe a duty to plaintiffs under this policy, rather
23 all members of the community owed a duty, including the
24 plaintiffs, to comply with this campus regulation. But that
25 duty of each member of the Cooper Union community does not mean

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1 that Cooper Union owes the entire campus the same duty back.
2 They cite, plaintiffs cite no rule or judicial decision for
3 such a reading of campus policies.

4 THE COURT: What about the human rights policy, that
5 policy seems to prohibit student-on-student harassment and also
6 guarantees that appropriate discipline will be imposed if a
7 violation occurs.

8 Why is that more -- I take your point about certain
9 allegations being generalized, about discrimination laws, but
10 why is the human rights policy more specific?

11 Why isn't it more specific?

12 MS. CLEARY: Your Honor, in this case, there is also
13 an allegation by plaintiffs that, in fact, Cooper Union
14 initiated disciplinary -- it initiated a review of the day to
15 consider the circumstances of the October 25 protest and deal
16 with the allegations and complaints that were raised.

17 THE COURT: Does Cooper Union have enough discretion
18 to also have the right to never enforce these policies?

19 In other words, did Cooper Union hold out these
20 policies to prospective students and then, in fact, never have
21 the intent to enforce them?

22 MS. CLEARY: So, your Honor, it's important to note
23 that no plaintiff filed a complaint under the human rights
24 policy. Plaintiffs do not allege that. We also don't
25 understand plaintiffs to allege that no investigation took

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1 place.

2 What they were complaining about in the complaint was
3 about the speed of the investigation and outcomes. And, again,
4 your Honor, they would have no reason to know of outcomes given
5 what obligations that the college has.

6 THE COURT: What they seem to be arguing is that
7 Cooper Union was arbitrarily failing to exercise its own
8 disciplinary rules, and that caused them to not receive the
9 benefits of the contract they entered into with the school.

10 How did that come short of stating a breach of
11 contract?

12 MS. CLEARY: Your Honor, I don't understand how a
13 breach of contract could survive here, given the fact that no
14 plaintiff complained about a violation of the human rights
15 policy. Cooper Union's generalized obligation to enforce its
16 policies is not really at issue here because none of the
17 plaintiffs here filed complaints. It's unlike *Kestenbaum*,
18 where there were allegations that Mr. Kestenbaum had filed a
19 complaint and nothing happened. There is no allegation here,
20 your Honor, that plaintiffs complained about violations of
21 Title VI and nothing was done.

22 Also, your Honor, that the human rights policy does
23 not have any provision as to the particular disciplinary
24 outcome that needs to happen, and there is no situation in
25 which individual students would ever know about specifically --

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1 about specific disciplinary action taken. That's for the
2 protection of all students on the Cooper Union campus.

3 THE COURT: So, if there is a prospective student who
4 is trying to decide which college to go to and reads Cooper
5 Union's human rights policy or its code of conduct policy and
6 see if what appears to be a commitment to enforce the most
7 serious forms of misconduct, it would seem reasonable for that
8 student to see that, as a promise, they will be protected if
9 they decide to go to Cooper Union and take that into account in
10 deciding which college to go to.

11 Do you disagree with that?

12 Because, I guess, in other words, by paying tuition
13 and agreeing to be regulated themselves by Cooper Union's
14 disciplinary policies, why wouldn't it be reasonable for a
15 student to also expect that they will be protected under those
16 policies from misconduct by others at the school?

17 MS. CLEARY: Your Honor, in this instance, there is no
18 allegation pled that any of the plaintiffs weren't protected
19 under Cooper Union's human rights policy. That is not in their
20 complaint, your Honor, so there could be no breach of contract.

21 It's also difficult to understand what the breach is
22 here, your Honor, because there is no right to a specific legal
23 discipline. I would also note, your Honor, that the *Davis* case
24 underscored that it is not within the ambit of a court in its
25 discretion to dictate how college administrators handle campus

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1 issues, that college administrators should be given wide berth
2 and should refrain from second-guessing the decisions of school
3 administrators in many circumstances such as this.

4 THE COURT: I think the breach of contract argument
5 here comes pretty close, if not directly, to making an argument
6 of a breach of the covenant of good faith and fair dealing.
7 Even if a party to a contract has discretion, the party cannot
8 exercise that discretion in an arbitrary manner, and in doing
9 so, deprived the other side of the fruits of the contract.
10 That seems to be what the argument is here.

11 MS. CLEARY: Your Honor, I go back to what complaint
12 did plaintiffs file which they have not pled under Cooper
13 Union's nondiscrimination policy.

14 How can there be a breach if they did not file a
15 complaint and Cooper Union didn't have an opportunity to
16 respond?

17 THE COURT: Ms. Cleary, feel free to touch on anything
18 else, hit on anything else you wish to. I think we covered a
19 lot.

20 MS. CLEARY: I'll just save five minutes for rebuttal,
21 your Honor. I think we have covered a lot.

22 THE COURT: Absolutely.

23 MS. CLEARY: Thank you.

24 THE COURT: OK. Ms. Romanovich.

25 MS. ROMANOVICH: Good morning, your Honor. Melissa

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1 Romanovich from Arnold & Porter for plaintiffs.

2 Your Honor, this court should deny Cooper Union's
3 motion to dismiss with respect to plaintiffs' Title VI claim in
4 its entirety for three reasons.

5 First, your Honor, the offending speech alleged in
6 plaintiffs' complaint were not simply policy pronouncements or
7 criticisms of Israel or its government, as Cooper Union has
8 made them out to be. Rather, they were deliberate calls for
9 violence against Jews and against Jewish people for whom
10 Zionism and affinity for Israel is integral to their Jewish
11 identity.

12 Cooper Union has conceded, your Honor, based on the
13 scenario presented, that this would change the calculus of the
14 litigation. Now, defendant would have this court believe that
15 plaintiffs filed this lawsuit simply because Cooper Union did
16 not prohibit expressions of opinion regarding complex
17 geopolitical issues in opposition to Israel. Cooper Union
18 argues, for example, on pages eight and nine of its motion to
19 dismiss, your Honor, "All of the third-party postings and
20 slogans at issue in the complaint constitute political speech
21 either criticizing Israel or supporting the Palestinian cause."
22 But your Honor this could not be further from the truth.

23 The offending speech was not just anti-Zionist or
24 anti-Israel. It was anti-Jewish. And it was not simply
25 speech, your Honor, it was pervasive harassment and

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1 intimidation. For example, in the wake of Hamas' brutal attack
2 on Israel on October 7, 2023, when students chanted "globalize
3 the intifada from New York to Gaza," they were calling to bring
4 deadly attacks against all Jewish people to New York to Cooper
5 Union. When they chanted "there is only one solution, intifada
6 revolution," they invoked Hitler's final solution, which did
7 not simply target Israelis or Zionists, it targeted all Jewish
8 people. If those students simply had wanted to express
9 anti-Israel views and have their views be heard, they could
10 have done so in a peaceful manner outside the building.

11 Instead, your Honor, they wanted to intimidate
12 plaintiffs. They chanted these genocidal slogans for hours,
13 and they stormed the Foundation Building, surrounded the Jewish
14 plaintiffs who sought refuge in the library. They banged on
15 the glass windows, rattling the locked library doors, shouting
16 antisemitic slogans and, let us in, and they held up
17 antisemitic and anti-Israel posters.

18 And then throughout the school year, your Honor,
19 plaintiffs were inundated with more antisemitic postings all
20 over campus encouraging violence as resistance and celebrating
21 violence against Jewish people. These were not expressions of
22 political opinion or peaceful slogans merely showing support
23 for the Palestinian cause, your Honor. These slogans and
24 expressions were meant to intimidate and instill fear in
25 plaintiffs simply because of their Jewish identity. This

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1 identity is protected, your Honor, under Title VI, and has been
2 recognized by the Office for Civil Rights, both Biden and Trump
3 administrations, the Supreme Court, and other college's
4 policies, including NYU and, most recently, Harvard. Cooper
5 Union failed to protect plaintiffs in violation of Title VI,
6 all while this hostile environment developed on campus.

7 Second, your Honor, Cooper Union is not bound by the
8 First Amendment as a private school. But even if it was, the
9 school cannot rely on freedom of speech or tout its respect for
10 political expression to justify allowing plaintiffs to suffer
11 and antisemitism to fester on its campus in violation of
12 Title VI. A school is obligated to balance students' freedom
13 of speech interests with its Title VI obligations.

14 Universities can prohibit actions and conduct that
15 materially and substantially disrupt the work of discipline of
16 the school, especially if the protesters obstruct Cooper
17 Union's educational mission through threats of violence.
18 What's more, your Honor, Cooper Union is required under
19 Title VI to act to eliminate a hostile environment for Jewish
20 students, even when speech is protected by the First Amendment,
21 and Cooper Union can do so without restricting those students
22 rights.

23 Cooper Union could have pursued any number of remedies
24 as detailed in the May 7, 2024, OCR Dear Colleague letter to
25 mete out antisemitism. Instead, your Honor, with each

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1 statement Cooper Union released, the school failed to mention
2 that the events of October 25 were motivated by antisemitism.
3 The school repeatedly downplayed the severity of the situation
4 and minimized what plaintiffs experienced in the library that
5 day.

6 The students who harassed plaintiffs, your Honor, on
7 October 25, and then throughout the school year, do not have a
8 First Amendment right to deprive Jewish students of the
9 benefits of a Cooper Union education, and Cooper Union should
10 have acted to uphold its Title VI obligations. At the very
11 least, your Honor should wait to address this free speech or
12 First Amendment issue until plaintiffs can put together a fully
13 developed factual record as the District Court of Massachusetts
14 permitted in *Kestenbaum v. Harvard*.

15 Third, and finally, your Honor, plaintiffs' complaint
16 sufficiently alleges that there was a severe and persuasive
17 hostile environment at Cooper Union, and Cooper Union was
18 deliberately indifferent to this hostile environment. The
19 harassment plaintiffs endured was severe and pervasive.
20 Harassment is severe or pervasive, your Honor, when it
21 undermines and detracts from plaintiffs' educational experience
22 and when it deprives them of taking advantage of an
23 institution's resources and opportunities.

24 I would like to make clear to the court that the
25 library incident on its own was sufficiently severe. A single

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1 act can be so severe to create a hostile environment for Title
2 VI purposes. After the protest outside during which protesters
3 chanted genocidal slogans, they then aggressed the library,
4 pounded on the glass windows, rattled the doors screaming let
5 us in, they shouted hateful slogans and held intimidating
6 signs, all while the Jewish plaintiffs were readily observable
7 inside. And as the plaintiffs were locked in the library
8 frantically calling police, texting and calling loved ones,
9 crying, the police offered to intervene and President Sparks
10 told the NYPD to stand down.

11 But even beyond the events of October 25, your Honor,
12 later throughout the year, plaintiffs were inundated with
13 violent antisemitic postings plastered all over campus. And,
14 your Honor, antisemitism and harassment motivated by
15 antisemitism persists at Cooper Union today. As a result, and
16 given the totality of the circumstances, plaintiffs have been
17 deprived of a full advantage of their Cooper Union education.
18 They avoid certain areas of campus, including the library,
19 still traumatized by what happened on October 25. They have
20 missed classes, they have seen their school work decline, they
21 have engaged therapists, they have suffered severe emotional
22 trauma, including experiencing anxiety and panic attacks.

23 Notwithstanding all of this, your Honor, the
24 determination of whether harassment is severe or pervasive is a
25 factual request that is best left for trial. Your Honor,

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1 plaintiffs submit that not only did they experience severe and
2 pervasive harassment, but Cooper Union has been deliberately
3 indifferent to this hostile environment. Cooper Union acted
4 unreasonably in light of the known circumstances, and we're not
5 aware of any remedial actions Cooper Union has taken against
6 those who calculated Cooper Union's policies and harassed
7 plaintiffs.

8 Accordingly, Cooper Union's conduct made plaintiffs
9 more vulnerable to harassment. Your Honor, counsel for Cooper
10 Union relies on the *StandWithUs MIT* classes. But MIT is
11 distinguishable in several respects. First of all, your Honor,
12 in *MIT*, it was a different deliberate indifferent standard than
13 here. But even so, your Honor, even under the *MIT* standard,
14 Cooper Union still failed to uphold its Title VI obligations.
15 And further, your Honor, MIT took steps in that case and
16 changed its approach, albeit unsuccessful, to eliminate the
17 hostile environment. The school attempted to curtail certain
18 protests, suspended protesters from nonacademic activities,
19 suspended a group that was noncompliant with procedures. When
20 that didn't work, the school warned students of discipline.
21 And when that didn't work, the school suspended and arrested
22 trespassing students.

23 Your Honor also mentioned *Zeno*. *Zeno* requires that
24 schools evolve and change their efforts as circumstances change
25 and remedial actions that have little more than half-hearted

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1 measures behind them are a basis for claimed deliberate
2 indifference.

3 Your Honor, I'm happy to provide the court with a
4 number of examples of --

5 THE COURT: Let me just ask about the response there.

6 Can you address the point then, one point Ms. Cleary
7 made, which is the decision essentially on October 25 not to
8 send the police in or have more forceful intervention was
9 essentially a calculated one. Doing so could have only led to
10 a worse response.

11 MS. ROMANOVICH: Well, your Honor, even if that is
12 true, the school had an opportunity to pursue remedial measures
13 after the fact, and the school does not -- or we're not aware
14 of any remedial measures the school pursued after the fact. It
15 would have been reasonable for the school to conduct an
16 investigation or discipline students who not only violated
17 school policies, but also harassed plaintiffs on that day. So
18 whether or not police intervention would have escalated the
19 situation on that day, there were a number of things Cooper
20 Union could have done after the fact as well.

21 THE COURT: How do you know that students were not
22 disciplined after the fact?

23 MS. ROMANOVICH: Your Honor, we're not aware that
24 students have or have not been disciplined, but surely the fact
25 that the hostile environment for Jewish students continues

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1 means that Cooper Union's efforts have been half-hearted at
2 best, and they have not changed their efforts to eliminate the
3 hostile environment for Jewish plaintiffs.

4 THE COURT: Let me bring you back to your, I guess,
5 the second point when you outlined the three main points that
6 you had that involves the First Amendment.

7 So I take it your position is that the First Amendment
8 has no relevance to a hostile educational environment claims in
9 this case.

10 MS. ROMANOVICH: Well, your Honor, even if the
11 student -- even assuming the students do have First Amendment
12 rights, which they may not necessarily here because Cooper
13 Union is a private school and can impose reasonable
14 restrictions to further its educational mission, Cooper Union
15 can take certain remedial measures without restricting those
16 students' First Amendment rights. There are a number of things
17 the school can do that would be reasonable to eliminate the
18 hostile environment on campus without suppressing or
19 prohibiting certain speech.

20 THE COURT: I guess where it gets complicated here is
21 that there appears to be, I think in my mind, two different
22 questions when we're looking at First Amendment here. One is
23 whether a private institution like Cooper Union can regulate
24 speech of a student without regard to the First Amendment. But
25 there is a separate question of whether congress can compel an

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1 institution to do so with the threat of civil liability.

2 In other words, why wouldn't your position necessarily
3 entail requiring a school to sensor or punish otherwise
4 protected speech to avoid facing liability for a hostile
5 educational environment under Title VI?

6 MS. ROMANOVICH: Well, your Honor, the speech here is
7 not necessarily protected speech because it was calling for
8 violence against Jewish students. So that is the first point,
9 your Honor.

10 But, second of all, Cooper Union, at minimum, should
11 be enforcing its policies to protect all students, including
12 Jewish plaintiffs, from a developing hostile environment.

13 THE COURT: But some of the speech here, if done on
14 the street, would be protected speech. So essentially we have
15 a situation here where Cooper Union might be facing liability
16 under Title VI because it did not sensor that speech.

17 Isn't that problematic?

18 MS. ROMANOVICH: Well, your Honor, the offending
19 speech here is helpful to assess whether there is a
20 discriminatory intent, so we're not asking Cooper Union to
21 suppress or prohibit antisemitism or otherwise offensive speech
22 no matter how objectionable or offensive that speech may be.

23 But when that speech turns into harassing conduct and
24 deprives Jewish students from taking full advantage of their
25 education, that's where the line is drawn and that is why

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1 Cooper Union needs to step in and assure that its upholding its
2 Title VI obligations. Federal agencies, for example, are
3 required to consider the IRA definition in contemporary
4 examples in determining whether there is a discriminatory
5 intent behind such conduct.

6 And so Cooper Union, looking at the totality of the
7 circumstances here, your Honor, Cooper Union can understand
8 that the harassing conduct is based on and motivated by
9 antisemitism.

10 THE COURT: When did the line get crossed here?

11 At what point did we go from speech that would remain
12 protected to speech that could give rise to liability here?

13 MS. ROMANOVICH: Well, your Honor, there is a number
14 of factors, your Honor.

15 A jury might consider including whether the protesters
16 were violating Cooper Union's own policies or its time, place,
17 and manner restrictions, whether the conduct was physically
18 threatening or humiliating, whether the speech or conduct was
19 directed kind of more generally or at a specific group, whether
20 there was psychological harm.

21 I would like to point out that physical harm or
22 property damage is not required here, your Honor. So the
23 existence or nonexistence of these different factors make for
24 very different circumstances and feelings, and so while the
25 speech may have demonstrated the intent, the antisemitism,

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1 which, again, we're not asking Cooper Union to suppress
2 objectionable speech, the conduct then turned into harassment
3 based on these and other factors.

4 THE COURT: I don't know if you're familiar with the
5 Supreme Court decision in *Pennhurst*, but that essentially goes
6 to the principle that congress must speak in clear terms when
7 it exposes recipients of federal funds to a private damages
8 suit. *Pennhurst*, I believe, involved the state facing a
9 liability.

10 But do we have a notice problem here under that
11 rationale? In other words, given the background of the First
12 Amendment principles that have been discussed, how could Cooper
13 Union have reasonably expected that a failure to censor or
14 punish debate or discussion on these matters could expose them
15 to monetary damages?

16 MS. ROMANOVICH: Well, your Honor, Cooper Union had
17 plenty of notice, contrary to what Cooper Union argues. Before
18 the protest, for example, Cooper Union was on notice and at
19 least one administrator acknowledged to a plaintiff that these
20 events tend to get violent, when that plaintiff expressed fear
21 and concern for that plaintiffs' safety.

22 Instead of taking appropriate measures or ensuring
23 that there was sufficient security presence that day,
24 administrators just told plaintiffs to stay inside, to avoid
25 unintended consequences. I'm happy to list a number of other

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1 paragraphs in which the complaint alleges notice that the
2 school had. But plaintiffs time and time again e-mailed
3 administrators, e-mailed professors, e-mailed others at Cooper
4 Union to express their fear and concern, and Cooper Union did
5 not rise to the occasion, your Honor.

6 THE COURT: Under your theory, would a lawsuit that is
7 basically flipped be able to survive?

8 In other words, would a student be able to file,
9 essentially, a mirror image of the claim arguing that there was
10 speech celebrating Israel's war in Gaza that created a hostile
11 environment for Palestinian students?

12 MS. ROMANOVICH: Your Honor, I think it would depend
13 on what the speech was there. If students are calling for
14 death or destruction of an entire group of people or calling
15 for globalize the intifada, globalize genocide, something like
16 that. That is a factual question that I think is best left to
17 a jury to determine.

18 But on the facts here, given the fact that the
19 protesters were calling for death to Jews and the globalization
20 of attacks on Jewish civilians, I think the case stands.

21 THE COURT: It's fairly easy to characterize a lot of
22 speech as calling for death if it involves actions occurring
23 during the war, isn't it?

24 MS. ROMANOVICH: Your Honor, again, it would be
25 dependent on what the actual words are and what the conduct

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1 associated with those words are.

2 Here, you had genocidal slogans that the Jewish
3 plaintiffs understood to mean death to Jews, and then that
4 speech then turned into harassing conduct, which obviously as
5 your Honor knows resulted in the students being locked in the
6 library and fearing for their safety.

7 So, your Honor must consider the totality of the
8 circumstances of what happened here and plaintiffs submit that
9 this was severe and pervasive.

10 THE COURT: I believe you mentioned before the
11 definition of antisemitism from the International Holocaust
12 Remembrance Alliance.

13 Can you speak more about why it's appropriate for me
14 to consider that definition.

15 Are there any allegations of how, for example, that
16 definition was developed or more broadly why it should be
17 afforded weight?

18 MS. ROMANOVICH: Sure, your Honor.

19 I'm not sure that there are any allegations that
20 explain how the IRA definition was developed, but pursuant to
21 President Trump's executive order 13899, federal agencies are
22 required to consider the IRA definition in its contrary example
23 of antisemitism in determining whether there is discriminatory
24 intent when enforcing Title VI.

25 Some examples of the contrary -- some example of the

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1 contrary examples in the definition include calling for or
2 justifying the killing and harming of Jews in the name of
3 radical etiology or denying Jewish people the right to self-
4 determination by claiming that Israel is a racist endeavor.

5 All, if not all, but most of the speech here, your
6 Honor, falls squarely within that definition in the contrary
7 examples. And so even if individual instances of speech may
8 not rise to -- may not rise to Cooper Union having violated
9 Title VI, they certainly contribute to understanding the intent
10 behind the conduct and why Cooper Union should have stepped in.

11 THE COURT: In terms of the deliberate indifference
12 element, I just want to understand clearly what you're relying
13 on there. For example, are you relying on Cooper Union's
14 failure to immediately condemn October 7 or otherwise not
15 providing an immediate statement in direct support of Israel?

16 Is that part of deliberate indifference, or is that
17 separate?

18 MS. ROMANOVICH: Your Honor, that more so goes to the
19 fact that plaintiffs have shown that Cooper Union treated them
20 as a group differently than other groups on campus, which speak
21 to plaintiffs' state and local discrimination claims.

22 But Cooper Union should have acted differently and
23 more reasonably with respect to the known circumstances at
24 every stage of the semester in the school year. I mentioned
25 before the protest, your Honor, Cooper Union was on notice of

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1 what was going to happen at the protest. The school should
2 have ensured a sufficient security presence instead of telling
3 students to simply stay inside during the protest. Cooper
4 Union you should have enforced its ID policy and should have
5 swiftly disbursed the protests. Instead, they permitted
6 students to bang on the glass windows, rattle the locked doors,
7 and harass the plaintiffs.

8 The school rejected NYPD's offer to intervene. And
9 then, as I mentioned, your Honor, after the protest, Cooper
10 Union should have conducted an investigation, should have
11 imposed some kind of disciplinary measures against those who
12 violated Cooper Union's policies and tormented plaintiffs.

13 THE COURT: Are you relying on certain allegations of
14 the conduct only for intent rather than the hostile
15 environment?

16 In other words, some of these allegations just based
17 solely to show the intent of the individuals who were
18 communicating the message?

19 MS. ROMANOVICH: No, your Honor. The speech and
20 conduct at issue here contributed to the hostile environment.
21 But to the extent any of the speech is protected by the First
22 Amendment, it is helpful to understand what the intent behind
23 that speech was and how it turned into the harassing conduct
24 that was motivated by antisemitism.

25 THE COURT: Do you allege that any of the

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1 communications were directed at particular Jewish students as
2 opposed to the community at large?

3 MS. ROMANOVICH: Well, your Honor, plaintiffs were
4 standing opposite the protesters that afternoon with hostage
5 posters. It's a fairly small school. Many of the students
6 have classes together and they made themselves identifiable
7 with those hostage posters. Many of the plaintiffs are also
8 visibly Jewish. They wear kippahs, they wear tzitzit, and so
9 the protesters outside, who may have recognized those Jewish
10 students, then pursued them at the library and aggressed the
11 plaintiffs instead. Inside the library, plaintiffs were also
12 visibly inside the library through the glass windows to the
13 protesters, and so they could definitely see who was inside.

14 THE COURT: We're just going to go back to a question
15 I asked a few minutes ago, just so it's clear in my mind. In
16 terms of the art display, or the Dr. Baratoff lecture, the
17 alumni letter, the vigil, how are you -- for what purposes are
18 you relying on those events?

19 MS. ROMANOVICH: Your Honor, we are relying on those
20 events and that speech to demonstrate how that speech
21 contributed to the hostile environment, but also many of those
22 expressions of speech continued to call for violence against
23 Jewish people. So not only did it contribute to the hostile
24 environment, but it also helps understand the harassing conduct
25 that ensued from the speech.

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1 THE COURT: Why would some of the offensive slogans
2 working than what was in Supreme Court's decision in Snyder,
3 which involved language that sounded like it was directly
4 celebrating terrorism, I think the quote there was, Thank God
5 for IUDs.

6 Why is what we have here worse than that?

7 MS. ROMANOVICH: Your Honor, it's not necessarily
8 worse or better, but it certainly contributed to the hostile
9 environment and made plaintiffs feel unsafe and unwelcomed in a
10 campus environment, whereas I mentioned it's a small school.
11 They know many of their peers.

12 So to stand outside and hear your peers shout
13 "globalize intifada," and there is only one solution, and then
14 have those same students who, moments before, were chanting
15 those genocidal slogans aggress the library and pound on the
16 glass windows and continue to shout antisemitic slogans and try
17 to gain entry into the library, plaintiffs did not know what
18 would happen next. They didn't know if they would be safe.

19 And so the slogans contributed to the hostile
20 environment and, again, your Honor, also explained the
21 motivation behind the harassing conduct.

22 THE COURT: Thank you.

23 MS. ROMANOVICH: Thank you, your Honor.

24 MR. GERSHONI: Good morning, your Honor.

25 THE COURT: Good morning, Mr. Gershoni.

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1 MR. GERSHONI: Thank you.

2 We can briefly address what Cooper Union stated in
3 their opening. So, as an initial matter, your Honor,
4 plaintiffs allege that Cooper Union breached its contracts with
5 plaintiffs by failing to perform under and enforce the
6 commitments reflected in its policies. Now I understand from
7 Cooper Union's response to your question today regarding about
8 whether or not these policies were enforceable, that they may
9 not believe that there is an enforceable contract between
10 Cooper Union and students.

11 But I would like to note, your Honor, that even in the
12 cases cited by Cooper Union, for example, *Aubrey v. The New*
13 *School*, New York law rules that the relationship between the
14 university and its students is contractual in nature and that
15 this contractual relationship begins when the student enrolls
16 at the university. New York law further recognizes that the
17 precise terms of the contractual relationship between the
18 university and its students are established by the university's
19 policies.

20 Now, Cooper Union tries to dismiss its own policies by
21 referring to them as general policy statements. They do this
22 by picking and choosing, but I believe, as your Honor pointed
23 out, there is more than just general policy statements in these
24 policies. For example, the building policy directly states
25 that IDs have to be checked. As further examples, your Honor,

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1 the policy upholding human rights.

2 THE COURT: Can I just ask about the building policy,
3 though. Did that policy, though, suggest in any way that
4 Cooper Union will take enforcement action to prevent or redress
5 violations of that policy?

6 MR. GERSHONI: I don't believe the policy specifically
7 provided what that extra process was, but as your Honor noted,
8 there was an implied good faith and fair dealing with the
9 students in the university, and the students are entitled to
10 ensure that its university is going to abide by its own
11 policies such to protect them in those situations.

12 As a further example, your Honor, I believe you
13 mentioned the policy upholding human rights. The policy
14 upholding human rights has many different provisions in it
15 that are very direct and not meet-and-confer general policy
16 statements. For example, the policy identifies to whom it
17 applies, it identifies how complaints are made, and it also
18 states if a policy violation is found, appropriate discipline
19 will be imposed.

20 I believe your Honor also identified the posting
21 policy. And the same thing, the posting policy, your Honor
22 identifies time, place, and manner restrictions on postings,
23 and it states that obvious violations of these rules are
24 subject to immediate removal by the Cooper Union agreement.

25 THE COURT: Are any of these policies just

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1 establishing duties that are owed to Cooper Union rather than
2 any guarantee of specific action that will be taken?

3 MR. GERSHONI: No, your Honor. I don't believe that's
4 true. And the cases that Cooper Union cites, for example, *The*
5 *New School* case, the *Doe v. Sarah Lawrence* case, they all state
6 that violations of these policies can actually establish a
7 breach of contract claim against a university, and this is
8 because a university has an implied contract with the students
9 to treat them in fair dealing. So a violation of the school's
10 own policy can sustain a breach of contract claim against the
11 students again the school.

12 Now, the third thing they addressed, your Honor, was
13 whether or not they have so-called broad discretion to apply
14 these policies. But even if they do have broad discretion to
15 apply these policies, the same two things apply. First,
16 implicit in the contract is a requirement that an institution
17 act in good faith and fair dealing with its students. That
18 comes directly from the *Yeshiva* case and also comes from the
19 *Sarah Lawrence* case.

20 Moreover, your Honor, using those two cases, another
21 example, district courts applying the New York law have applied
22 to breach of contract claim to survive when a student plausibly
23 alleged their assault was not handled in accordance with the
24 school's own internal policy. So determining whether Cooper
25 Union's decision to enforce or not enforce its policies is

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1 really a factual issue here.

2 So, for example, your Honor, with respect to whether
3 discipline will be imposed, plaintiff has specifically alleged
4 that they are not aware of any discipline being imposed. So
5 whether or not that was in line with the university's
6 obligation to treat its students in fair dealing is a factual
7 question that should be addressed in discovery.

8 THE COURT: Aren't schools entitled to considerable
9 amount of discretion in deciding how to enforce its
10 disciplinary policies?

11 It would seem like this is an area that I or a jury,
12 for that matter, would be equipped to second guess

13 MR. GERSHONI: I think it depends on the specific
14 language of the policy, your Honor. Refer to the policy
15 upholding human rights, it states if a policy violation is
16 found, appropriate discipline will be imposed. It's very
17 definitive language. It states that discipline will be
18 imposed.

19 Now, whether or not no discipline imposed meets this
20 policy or comports with the university's obligation to treat
21 its students with fair dealing is the factual question. But on
22 its face, what courts in this district have looked for is
23 whether or not there is a sufficiently definitive statement in
24 the policies, such that you can find a breach of contract
25 claim.

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1 THE COURT: Do you allege any specific procedures for
2 handling misconduct that were not complied with in this case?

3 MR. GERSHONI: Upon information and belief, your
4 Honor, what we just identified that there was no appropriate
5 discipline will be imposed.

6 THE COURT: At the end, you're targeted at the end of
7 the ultimate conclusion.

8 MR. GERSHONI: That's correct.

9 THE COURT: Before that, do you allege anything?

10 MR. GERSHONI: So we identify -- we include, for
11 example, your Honor, a lot about the policy upholding human
12 rights, which specifically identifies what identity-based
13 discrimination is. We cite to that policy directly in the
14 complaint. That policy also has a lot of process and
15 procedures in it.

16 For example, in it notes that complaints would be
17 made, but they don't have to be made in citing, and they can be
18 made directly to an associate dean. It further states once a
19 complaint is made, it will be referred to an equal employment
20 officer, and then there is a handful of other policies, for
21 example, that identifies that notice will be provided and so
22 forth. But, again, despite having various allegations in
23 the complaint about complaints that students make to the
24 university, upon information and belief, there has been no
25 discipline ultimately imposed.

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1 And with respect to the posting policy, I mean,
2 these policies are important and they are important for a few
3 reasons, your Honor. For example, the posting policy isn't
4 just limited to, you know, it's not, like, a meet-and-confer
5 technicality that if a poster is up on the wall, for example,
6 there it's a problem. The issue here, your Honor, is that
7 these policies are in place to protect students from content
8 that is to be inundated from offensive conduct.

9 So we had submitted that many of the posters violated
10 Cooper Union's policies, and because they violated those
11 policies, these students were inundated everywhere they went
12 with offensive conduct. They saw it in the elevators, they saw
13 in the bathrooms, they saw it in the classrooms, they saw it on
14 the windows of the Foundation Building. And because of that,
15 as we allege, plaintiffs no longer feel safe on campus. They
16 have engaged therapists, they have dropped classes, failed to
17 perform their school work, delayed proceeding graduation of
18 degrees and so forth.

19 THE COURT: Can you also respond to the argument,
20 though, that Ms. Cleary made that no student ever lodged a
21 complaint with respect to these policies or the enforcement of
22 these policies?

23 MR. GERSHONI: Yes.

24 So the complaint has a few different examples of
25 students talking to different deans at the university. For

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1 example, I refer the court to paragraph 62 and 76 in the
2 complaint. And there it states, looking at paragraph 62, for
3 example, it states that despite the prominent location, the
4 harassing conduct complaints about the postings communicated
5 about students of concerned parents could be associate dean for
6 academic affairs --

7 THE COURT: Just go back a little bit and say that
8 again a little bit slower.

9 MR. GERSHONI: Sure.

10 Paragraph 62 of the complaint, your Honor states,
11 Despite the prominent location, the harassing content,
12 complaints about the posters communicated by students and
13 concerned parents of the associate dean for academic affairs,
14 Ruben Savizky, and the dean of engineering, Barry L. Shoop, and
15 the posters blatant violation of several Cooper Union policies,
16 the posters remained displayed in the windows for hours facing
17 the New York City public.

18 Now, that's a specific allegation about the complaints
19 made to the university about these posters. Paragraph 76 of
20 the complaint, your Honor, also states that after receiving
21 complaints about the reappearance of the offensive posters,
22 Cooper Union told plaintiffs that the school would take no
23 action to remove the signs since the sidewalk is a public
24 property. Your Honor, we do have allegations in the complaint
25 about complaints made to the university. And in order to make

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1 a complaint under the policy upholding human rights, all that
2 is required is that if the complainant is a student, complaints
3 can be submitted to the equal opportunity officer, the dean of
4 students, the associate dean of students, or an academic dean,
5 which is what we identified in the complaint.

6 So unless your Honor has any further questions.

7 THE COURT: Thank you, Mr. Gershoni.

8 MR. GERSHONI: Thank you.

9 MS. GERSHONI: Good morning, your Honor. I will be
10 brief. My name is Bridgette Gershoni here on behalf of the
11 plaintiffs, and I will be discussing plaintiffs' common law
12 claims, and to the extent your Honor has any questions about
13 the remedies.

14 So, first, your Honor, Cooper Union wrongly argues in
15 its briefing that pleading physical harm is required to sustain
16 a claim for common law of negligence and negligent infliction
17 of emotional distress. Cooper Union's reliance for this
18 proposition is on two cases, *Benoit* and *Caronia*, which are
19 cited in the briefing. But, your Honor, we would like to point
20 out that both of these cases were distinct because they
21 involved cases for claims for medical monitoring, which is
22 where the plaintiffs were claiming they were personally
23 injured, but asking the court for discovery to confirm as much.
24 That is not at issue here. Rather, New York law is clear that
25 a plaintiff can recover for negligence and negligent infliction

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1 of emotional distress even though no physical injury occurred.

2 Second, your Honor, Cooper Union argues that it cannot
3 owe plaintiffs a duty simply to protect plaintiffs from
4 tortious acts of third parties simply because it is a college,
5 and New York has rejected the doctrine of *in loco parentis* at a
6 collegiate level. This is legally unfounded, your Honor. Case
7 law is clear that a duty can be placed on a college in certain
8 circumstances which we plead are present here.

9 So, first, where a college has encouraged its students
10 to participate in an activity and took affirmative steps to
11 control or supervise that activity. Second, where the college
12 was in the best position to protect the students against the
13 risk of harm. We submit that the complaint involves
14 allegations that meet both of these standards specifically as
15 we have discussed Cooper Union was well aware of the planned
16 protest ahead of time. It was not only aware of rising
17 tensions on campus, but also aware of rising tensions at other
18 campuses around the city during that time. Even worse, Cooper
19 Union was on specific notice of the safety concerns brought by
20 plaintiffs to several deans prior to and during the events of
21 October 25.

22 Cooper Union, as we plead in our complaint, your
23 Honor, one plaintiff informed a Cooper Union dean of their
24 reasonable safety concerns ahead of the protest, and the dean
25 responded that a Cooper Union's team was -- security team was,

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1 quote-unquote, well aware of the proposed event and will be
2 extra vigilant. Not only were Cooper Union professors and
3 administration in attendance at the protest itself, but some
4 professors canceled class and some professors even offered
5 extra credit for their students to participate in the
6 October 25 protest. And so we submit that these, there can be
7 little doubt that in this situation, Cooper Union was in the
8 best position to protest the plaintiffs and it failed to do so.

9 Now, on to negligent infliction of emotional distress,
10 your Honor. Cooper Union argues that extreme and outrageous
11 conduct is required. We believe that it is not. That is
12 supported by several recent decisions, including decisions from
13 the Southern District of New York in 2024 which articulate the
14 standard for negligent infliction of emotional distress without
15 articulating a requirement for extreme and outrageous conduct.

16 We also note that the Second Circuit also recites the
17 elements for this claim without reciting a requirement for
18 extreme and outrageous conduct. But even if extreme and
19 outrageous conduct were found to be a required element of
20 negligent infliction of emotional distress, plaintiffs submit
21 that our complaint is replete with allegations that would meet
22 this standard.

23 As we have discussed, your Honor, the plaintiffs were
24 in the library during the incident. Some of them were crying.
25 Some of them were afraid for their safety. afraid for their

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1 lives. They were texting loved ed ones. They called the New
2 York Police Department several times. And upon information and
3 belief, the police offered to intervene, and President Sparks,
4 the president of Cooper Union, told the police to stand down,
5 to not intervene.

6 Now, your Honor, I want to respond to something that
7 Cooper Union's counsel mentioned this morning. And they said,
8 well, they told the police not to intervene because this was a
9 measured response. They didn't want to escalate the situation.
10 I guess our question would be, escalate the situation for who?
11 The situation was already escalated for plaintiffs. They were
12 fearful of their lives. It is clear that Cooper Union could
13 have done something during this incident. They could have
14 accepted police presence. They could have involved their,
15 quote-unquote, extra vigilant security team. Instead, for
16 20 minutes plaintiffs were harassed in the library while people
17 were violently shaking the doors and windows trying to get into
18 the situation.

19 It is clear, Cooper Union could have done something.
20 They don't do a lot of things because they were looking out for
21 their own interests. They were not acting in the best interest
22 of the students under the duty of care that they were owed.
23 Now, your Honor, Cooper Union also argues that a claim of
24 physical injury is required to meet the extreme and outrageous
25 conduct standard, and thus, is required for a claim of

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1 negligent infliction of emotional distress. Yet, this argument
2 is directly belied by Cooper Union's own acknowledgment on page
3 eight of its reply characterizing an NIED claim that can be
4 maintained in the absence of physical injury as an
5 uncontroversial position.

6 Lastly, your Honor, we would challenge Cooper Union's
7 position that plaintiffs' safety was not objectively
8 endangered. As we discussed, for all the reasons we have
9 discussed, the facts support that plaintiffs' safety, in fact,
10 was objectively endangered. But, in addition --

11 THE COURT: Well, what allegations are there about
12 that?

13 I mean, there certainly are allegations as to a
14 subjective evaluation based on the plaintiffs' state of mind.
15 But do you allege that the protesters on October 25 engaged in
16 behavior that created an unreasonable risk of physical harm to
17 the students in the library.

18 MS. GERSHONI: Yes, your Honor. There can be no
19 doubt. There are several allegations that support this.

20 So, for example, the fact -- we can start with the
21 fact that the protests were outside screaming genocidal chants
22 directly at plaintiffs. But, beyond that, once they got into
23 the building without swiping their IDs, Cooper Union locked the
24 doors to the library, as we plead, and it wasn't plaintiffs who
25 locked the doors to the library. So at least somebody in the

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1 library who was a Cooper Union administrator followed the lead
2 to lock the doors to prevent the protesters from coming into
3 physical contact with plaintiffs. But beyond that, the
4 protesters, the violent chants themselves, the shaking, the
5 violently rattling on the doors to let us in, in addition, once
6 they were unable to gain entry, banging on the doors and
7 directing their chance at plaintiffs who were visibly Jewish
8 students.

9 But even Cooper Union's counsel earlier this morning
10 characterized Cooper Union offered -- acknowledged that Cooper
11 Union offered some of the students security escort away from
12 the library. Cooper Union's counsel characterized this today
13 as a safe exit as opposed to an unsafe exit, right, without a
14 security escort. And it wasn't until, we note, after the mob
15 disbursed on its own regard that the security escort was
16 offered to the students.

17 Lastly, your Honor, even after the fact -- sorry.
18 I want to note the fact that President Sparks locked her own
19 office door. Clearly she was afraid of some sort of physical
20 altercation between her and the protesters. And Cooper Union
21 administration, offering plaintiffs potential solutions,
22 alternative exits to avoid the protesters, and lastly, in
23 Cooper Union's subsequent e-mail to its students regarding the
24 event, these e-mails included plans to, quote-unquote, ensure
25 a safe campus that upholds Cooper Union's policies.

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1 So we think that there are a plethora of allegations
2 in the complaint that would support the fact that plaintiffs'
3 safety was objectively endangered during the October 25
4 protest.

5 THE COURT: OK. Thank you, Ms. Gershoni.

6 MS. GERSHONI: We thank you for your time. Unless
7 your Honor has any further questions, we ask for these reasons
8 and for the reasons presented by my colleagues that the court
9 deny defendants' motion in its entirety.

10 Thank you.

11 THE COURT: Thank you.

12 Ms. Cleary, you wanted some time for rebuttal.

13 MS. CLEARY: Yes. Thank you, your Honor. So I will
14 move through the argument of the counsel as promptly as
15 possible, your Honor.

16 First, with respect to the Title VI claims, the court
17 doesn't need to reach the First Amendment offensive speech
18 issues. The Title VI claim fails on two other elements, lack
19 of substantiation of deliberate indifference and deprivation of
20 educational benefits.

21 I direct the court to the 10/31 statements that Cooper
22 Union issued in which Cooper Union said there is no place at
23 Cooper Union for hateful and violent language or actions.
24 Cooper Union announced the review, a review of the day, and
25 reminded the community that disciplinary proceedings are

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1 confidential. Cooper Union condemned antisemitism and hateful
2 speech and announced resources for the entire community. Later
3 on there was an alumni statement response very similar
4 denouncing the terrorist attacks in a 10/11 statement and
5 condemning antisemitism.

6 With respect to the *MIT* case, it's important to
7 underscore that there was no allegation that MIT called the
8 police at the first conceivable opportunity, it was two weeks
9 after the encampment had started. With respect to your Honor's
10 point about compelling Cooper Union to violate the First
11 Amendment, we cite a decisional law saying that it is not
12 appropriate for a recipient of federal funds to be compelled to
13 gag First Amendment rights.

14 With respect to the statements made on 10/9, they
15 were condemned as horrific. We announced counseling and
16 acknowledged the direct impact on the community. As explained
17 in Exhibit 3 to the Cleary declaration, the 10/31 response to
18 the alumni, there was a second statement issued denouncing
19 terrorist attacks. There were two statements on 10/31
20 denouncing violence, hate speech, antisemitism, and announcing
21 a review of the day and resources available to students. So
22 there were at least four statements beginning within 48 hours
23 of the 10/7 seven terrorist attacks by Cooper Union.

24 With respect to the breach of contract arguments,
25 counsel paraded horribles, alleging that there was a lack of

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1 good faith and fair dealing. That really goes to opening the
2 door for a private right of action every time a student
3 disagrees with a disciplinary outcome by Cooper Union. There
4 is no enforceable contract without an individual complaint.
5 There are specific process rights under Cooper Union's policy.
6 That is not what is at issue here, and the case law is very
7 supportive about a cause of action arising only where there is
8 a failure to follow specific procedures vis-a-vis a complainant
9 or a victim or a subject of the complaint.

10 In *Annabi* cited by plaintiffs' counsel, that breach of
11 contract action was dismissed because it was not sufficiently
12 definite. There was a promise and no violation of a specific
13 contractual promise. In *Aubrey*, there was a value statement
14 that was held not specific or enforceable, though the court did
15 uphold a promise of an in-person educational opportunity
16 sufficiently specific.

17 With respect to the complaint mention of paragraph
18 two, there is an admission that one complaint was made, but
19 there was also -- and that was not mentioned by plaintiffs'
20 counsel -- an admission that the posters were taken down within
21 hours, and there was no allegation in that paragraph that
22 Cooper Union knew who did this.

23 With respect to paragraph 76, the complaint about
24 language was about public property. Cooper Union obviously has
25 no authority to address what happens on public property and

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1 it's not a breach of the policy to do so.

2 With respect to the common law claims, Cooper Union
3 did not argue physical harm was required for an NIED claim. It
4 did with respect to a negligence claim, and there is no case
5 law cited that negligence doesn't have a physical harm
6 requirement.

7 THE COURT: As to the negligent infliction of
8 emotional distress claim, though, do you wish to respond to
9 Ms. Gershoni's points about why there was an objective risk of
10 physical harm?

11 MS. CLEARY: Yes, your Honor.

12 Even accepting their arguments, there are three
13 exceptions, the bystander theory, which is not applicable here;
14 the special circumstances theory, misdiagnosing someone with
15 HIV or mishandling a loved ones remains, but then there is the
16 direct duty theory. But, in that instance, plaintiff has to
17 show they suffered emotional distress caused by defendant's
18 breach of a duty which unreasonably endangered plaintiffs own
19 physical safety. And there is an objective component to that
20 direct duty exception since plaintiffs allege that the library
21 doors were allegedly locked when the demonstrators arrived
22 outside the library and they also admitted that they never
23 entered the library. They cannot sufficiently plead that their
24 safety was objectively and unreasonably endangered with an
25 allegedly locked door.

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1 THE COURT: Thank you.

2 MS. CLEARY: I have no other points to make, your
3 Honor, unless you have questions.

4 THE COURT: I don't. Thank you for addressing all of
5 those issues. And let me also just thank counsel from both
6 sides for your excellent argument today and your excellent
7 submissions.

8 I'll, of course, take the motions under advisement and
9 hope to issue my opinion in the near term, but today's argument
10 was very helpful. So, again, I appreciate the obvious
11 preparation that went into this morning.

12 Hope everyone has a good rest of the day. And those
13 of you going back to DC, safe travels.

14 MS. CLEARY: Thank you, your Honor.

15 (Adjourned)

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